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and JOHN H. OWOC, a.k.a. JACK OWOC

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

MONSTER ENERGY COMPANY, a  
Delaware corporation,

Plaintiff,

vs.

VITAL PHARMACEUTICALS, INC.,  
d/b/a VPX Sports, a Florida corporation;  
and JOHN H. OWOC a.k.a. JACK  
OWOC, an individual

Defendants.

Case No. 5:18-cv-01882-JGB-SHK

**DEFENDANTS' L.R. 16-4  
MEMORANDUM OF  
CONTENTIONS OF FACT AND  
LAW**

District Judge:  
Hon. Jesus G. Bernal

Magistrate Judge:  
Hon. Shashi H. Kewalramani

Final Pretrial Conference

Date: Feb. 14, 2022

Time: 11:00 AM

Courtroom: 1

Trial: Apr. 5, 2022

Pursuant to C.D. Cal. L.R. 16-4, Defendants Vital Pharmaceuticals, Inc. (“VPX”) and John H. Owoc (“Owoc”) (collectively, “Defendants”) hereby submit the following as their Memorandum of Contentions of Fact and Law.

**I. PLAINTIFF’S CLAIMS AGAINST DEFENDANTS**

**A. Claim 1 – False Advertising**

**1. Monster’s Claim**

For Monster’s first claim, stemming from its First, Second, and Third Causes of Action, Monster alleges that the Defendants have violated Section 43(a) of the Lanham Act, the California Unfair Competition Law (“UCL”), and the California False Advertising Law (“FAL”), all predicated on the claim that Defendants have falsely advertised the nature or quality of VPX’s Bang product.

The elements required to establish Monster’s claim for violation of the Lanham Act are as follows:

1. Defendants made a false statement of fact, in a commercial advertisement, about the nature or quality of VPX’s Bang product;
2. That statement actually deceived or had the tendency to deceive, a substantial segment of Defendants’ audience;
3. Such deception was material, in that it likely influenced the purchasing decision;
4. Defendants’ caused the falsely advertised goods to enter interstate commerce; and
5. Monster has been, or is likely to be, injured as a result of Defendants’ false advertising.

*See* 2017 Ninth Cir. Manual of Model Jury Instructions, Sec. 15.5; *Rice v. Fox Broadcasting Co.*, 330 F.3d 1170, 1180 (9th Cir. 2003), *overturned on other grounds* *Skidmore v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020); Fed. Civ. Jury Instr. 7th Cir. 13.3.1 (2021); *Café Found., Inc. v. Seeley*, 2016 WL 1258624, at \*3 n.4 (N.D. Cal. Mar. 31, 2016) (UCL and FAL claims are analyzed together Lanham Act

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claims).

The key evidence Defendants intend to present in opposition to this claim includes: Defendants will present evidence through testimony and documents showing that Monster has failed to show an organized advertising or promotional campaign with widespread dissemination of a false statement of fact about Bang or Super Creatine (Creatyl-L-Leucine or CLL), including testimony from Jack Owoc, Meg Owoc, Robbie Durand, and others, as well as social media, website posts, product packaging, and cans of Bang. Defendants will present percipient and expert testimony establishing that there are many forms of creatine in the marketplace and that CLL is a creatine analog or derivative and a form of creatine. Defendants will also show that its testing and Monster's own testing shows there is CLL in Bang. Defendants will also show through the use of their consumer surveys and surveys conducted by Monster itself, including two pre-litigation surveys, that demonstrate that Super Creatine is not material to consumers' purchasing decisions. Defendants will also present documents and the testimony of both VPX, Monster representatives (including Monster's 30(b)(6) witness, Emilie Tirre) and third party witnesses that Super Creatine is not material to consumers' purchasing decisions. Defendants will also present percipient and expert testimony about the numerous reasons (other than Super Creatine) that consumers purchase Bang and make it a highly successful product in the energy drink market. Defendants will also present documents and percipient and expert testimony showing that sugar-containing energy drinks (including Monster's flagship Green beverage) result in sugar crash and other adverse health events. Defendants will also demonstrate through documents and testimony that Monster's products and Bang are completely different products that target different consumers and that Monster has wholly failed to establish (1) that consumers buy Bang because of the Super Creatine ingredient, (2) that consumers purchase Bang instead of Monster's products because of the Super Creatine in Bang, or (3) which specific Monster's products have lost sales because of the Super

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1 Creatine in Bang. Defendants will also show that Bang's growth in sales and market  
2 share were incremental to the energy drink market. Defendants will present  
3 documents and percipient and expert testimony to demonstrate that Monster has  
4 failed to establish any damages as a result of alleged false advertising.

5 2. Defendants' Affirmative Defenses<sup>1</sup>

6 Defendants' first affirmative defense against Monster's claim for False  
7 Advertising is Failure to Mitigate Damages. The elements to this affirmative  
8 defense include: (1) Monster failed to use reasonable efforts to mitigate its damages,  
9 and (2) the amount by which Monster's damages would have been mitigated. *See*  
10 *Palla v. LM Sports, Inc.*, 2019 WL 6464621, at \*9 (E.D. Cal. Dec. 2, 2019) (citing  
11 MODEL CIV. JURY INSTR. 9th Cir. 5.3) ("defendant arguing a plaintiff failed to  
12 mitigate damages bears the burden of proving two elements by a preponderance of  
13 the evidence: (1) that the plaintiff failed to use reasonable efforts to mitigate  
14 damages; and (2) the amount by which damages would have been mitigated").  
15 Model Civ. Jury Instr. 9th Cir. 5.3. The key evidence Defendants intend to present  
16 in support of this affirmative defense includes: Defendants will present testimony  
17 and documents establishing that Monster was aware of Bang, its inclusion of creatine  
18 as an ingredient and its "Super Creatine" advertising for years and did nothing before  
19 eventually filing a lawsuit for anti-competitive purposes once Bang started to  
20 become a highly successful energy drink product in an attempt to litigate VPX out  
21 of the market, as Monster has done with other competitors.

22 Defendants' second affirmative defense against Monster's claim for False  
23 Advertising is Waiver. The elements to this affirmative defense include: the  
24 intentional relinquishment of a known right after full knowledge of the facts, or

25 \_\_\_\_\_  
26 <sup>1</sup> Although not enumerated here, Defendants expressly reserve the right to assert and  
27 do not waive other defenses identified in its Answer, (*see* ECF 123), including  
28 failure to state a claim; lack of damages; punitive / enhanced damages improper;  
attorneys' fees improper; lack of standing; no injunctive relief; reasonable conduct;  
causation; bad faith; and constitutional protections.

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1 Monster's knowledge of Defendants' alleged violation without timely notification  
2 of such violation. *See G.P.P., Inc. v. Guardian Prot. Prod., Inc.*, 2017 WL 220305,  
3 at \*43 (E.D. Cal. Jan. 18, 2017), *on reconsideration in part* 2017 WL 698335 (E.D.  
4 Cal. Feb. 21, 2017). The key evidence Defendants intend to present in support of  
5 this affirmative defense includes: Defendants will present testimony and documents  
6 establishing that Monster was aware of Bang, its inclusion of creatine as an  
7 ingredient and its "Super Creatine" advertising for years and did nothing before  
8 eventually filing a lawsuit for anti-competitive purposes once Bang started to  
9 become a highly successful energy drink product in an attempt to litigate VPX out  
10 of the market, as Monster has done with other competitors.

11 Defendants' third affirmative defense against Monster's claim for False  
12 Advertising is Estoppel. The elements to this affirmative defense include: (1)  
13 Monster knew the facts; (2) Monster intended his conduct to be acted on (or acted  
14 in a manner such that Defendants have a right to believe Monster intended such  
15 reliance); (3) Defendants were ignorant of the true facts; and (4) Defendants relied  
16 on Monster's conduct to their detriment. *See Buster v. Comp. Comm. of the Bd. of*  
17 *Directors of Mechanics Bank*, 2016 WL 6804581, at \*2 (N.D. Cal. Nov. 17, 2016)  
18 (citing *Gabriel v. Alaska Elec. Pension Fund*, 773 F.3d 945, 955 (9th Cir. 2014)).  
19 The key evidence Defendants intend to present in support of this affirmative defense  
20 includes: Defendants will present testimony and documents establishing that  
21 Monster was aware of Bang, its inclusion of creatine as an ingredient and its "Super  
22 Creatine" advertising for years and did nothing before eventually filing a lawsuit for  
23 anti-competitive purposes once Bang started to become a highly successful energy  
24 drink product in an attempt to litigate VPX out of the market, as Monster has done  
25 with other competitors. Defendants will also show through testimony and  
26 documents that Monster attempted to create a shelf-stable form of creatine to include  
27 in its Reign product, developed to compete directly with Bang. Defendants will also  
28 show through testimony and documents that Monster ultimately developed a copycat

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product to Bang (*i.e.*, Reign) that included similar ingredients, can design, and flavors. Defendants will also demonstrate that in the months leading up to the launch of Reign, Monster filed this lawsuit as part of a coordinated smear campaign against VPX, Owoc and Bang, including the creation of a website called The Truth About Bang and the hiring of bloggers on social media to promote and publicize its meritless allegations of false advertising by VPX about Bang, communications to the media, retailers and distributors advising them of the lawsuit and its claims of false advertising about Bang, and placement of Truth About Bang placards on store shelves near Bang products. Defendants will also present evidence that Monster disseminated information to retailers and consumers about claimed dangerous levels of caffeine in Bang, despite numerous adverse health events, including heart attacks and deaths, tied to Monster's own products, and then created new Monster products with the same amount of caffeine as Bang. Defendant will also present evidence concerning Monster's "Operation Eradicate Bang" campaign, f\*bang campaign, and other blitzes/campaigns designed to interfere with Bang's shelf space and sales, including the interference, relocation or removal of Bang cans and displays, and taking of shelf space and facings. Defendants will also show that Monster sold its products for many years before obtaining GRAS certification and in practice follows the same FDA labeling rules as VPX on its own cans.

Defendants' fourth affirmative defense against Monster's claim for False Advertising is Unclean Hands. The elements to this affirmative defense include: (1) Monster's conduct is inequitable, and (2) such conduct relates to the subject matter of its claims. *See POM Wonderful LLC v. Coca Cola Co.*, 166 F. Supp. 3d 1085, 1092 (C.D. Cal. 2016) ("To prevail on a defense of unclean hands, a defendant must demonstrate by clear and convincing evidence (1) that the plaintiff's conduct is inequitable; and (2) that the conduct relates to the subject matter of the plaintiff's claims."). The key evidence Defendants intend to present in support of this affirmative defense includes: Defendants will present testimony and documents



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1 establishing that Monster was aware of Bang, its inclusion of creatine as an  
2 ingredient and its “Super Creatine” advertising for years and did nothing before  
3 eventually filing a lawsuit for anti-competitive purposes once Bang started to  
4 become a highly successful energy drink product in an attempt to litigate VPX out  
5 of the market, as Monster has done with other competitors. Defendants will also  
6 show through testimony and documents that Monster attempted to create a shelf-  
7 stable form of creatine to include in its Reign product, developed to compete directly  
8 with Bang. Defendants will also show through testimony and documents that  
9 Monster ultimately developed a copycat product to Bang (*i.e.*, Reign) that included  
10 similar ingredients, can design, and flavors. Defendants will also demonstrate that  
11 in the months leading up to the launch of Reign, Monster filed this lawsuit as part of  
12 a coordinated smear campaign against VPX, Owoc and Bang, including the creation  
13 of a website called The Truth About Bang and the hiring of bloggers on social media  
14 to promote and publicize its meritless allegations of false advertising by VPX about  
15 Bang, communications to the media, retailers and distributors advising them of the  
16 lawsuit and its claims of false advertising about Bang, and placement of Truth About  
17 Bang placards on store shelves near Bang products. Defendants will also present  
18 evidence that Monster disseminated information to retailers and consumers about  
19 claimed dangerous levels of caffeine in Bang, despite numerous adverse health  
20 events, including heart attacks and deaths, tied to Monster’s own products, and then  
21 created new Monster products with the same amount of caffeine as Bang. Defendant  
22 will also present evidence concerning Monster’s “Operation Eradicate Bang”  
23 campaign, f\*bang campaign, and other blitzes/campaigns designed to interfere with  
24 Bang’s shelf space and sales, including the interference, relocation or removal of  
25 Bang cans and displays, and taking of shelf space and facings. Defendants will also  
26 show that Monster sold its products for many years before obtaining GRAS  
27 certification and in practice follows the same FDA labeling rules as VPX on its own  
28 cans.

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Defendants' fifth affirmative defense against Monster's claim for False Advertising is Laches. The elements to this affirmative defense include: acquiescence despite full knowledge of the facts, with Monster engaging in an unreasonable delay, with such delay prejudicing Defendants. *See Obesity Research Inst., LLC v. Fiber Research Int'l, LLC*, 165 F. Supp. 3d 937, 954 (S.D. Cal. 2016). The key evidence Defendants intend to present in support of this affirmative defense includes: Defendants will present testimony and documents establishing that Monster was aware of Bang, its inclusion of creatine as an ingredient and its "Super Creatine" advertising for years and did nothing before eventually filing a lawsuit for anti-competitive purposes once Bang started to become a highly successful energy drink product in an attempt to litigate VPX out of the market, as Monster has done with other competitors.

Defendants' sixth affirmative defense against Monster's claim for False Advertising is Statute of Limitations. The elements to this affirmative defense include: Lanham Act false advertising claims in California are governed by a three-year statute of limitations. *See Baby Trend, Inc. v. Playtex Prod., LLC*, 0213 WL 4039451, at \*3 (C.D. Cal. Aug. 7, 2013) ("California's statute of limitations for fraud should apply to Lanham Act claims"; adding "California law provides a three-year statute of limitations for fraud"). The key evidence Defendants intend to present in support of this affirmative defense includes: Defendants will present testimony and documents establishing that Monster was aware of the alleged advertising statements identified in the First Amended Complaint more than three years before it filed the present action.

Defendants' seventh affirmative defense against Monster's claim for False Advertising is Preemption. The elements to this affirmative defense include: (1) Congress has enacted a statute that expressly preempts state law; (2) federal law occupies a legislative field to such an extent that it is reasonable to conclude that Congress left no room for state regulation in that field; or (3) state law actually



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1 conflicts with federal law. *Chavez v. Blue Sky Nat. Beverage Co.*, 268 F.R.D. 365,  
2 369 (N.D. Cal. 2010) (citing *Chae v. SLM Corp.*, 593 F.3d 936, 941 (9th Cir. 2010)).  
3 The key evidence Defendants intend to present in support of this affirmative defense  
4 includes: Defendants will present testimony and documents establishing that the  
5 Food and Drug Administration (FDA) regulates a product's or manufacturer's  
6 compliance with GRAS designation, that the CLL in Bang is GRAS compliant, and  
7 that there is no FDA requirement that VPX list the amount of CLL containing in  
8 Bang on the Bang can.

9 Defendants' eight affirmative defense against Monster's claim for False  
10 Advertising is Lack of Personal Jurisdiction as to Mr. Owoc. The elements to this  
11 affirmative defense include: "A court may exercise general jurisdiction over a  
12 defendant whose contacts with the forum are so 'continuous and systematic' that  
13 personal jurisdiction is proper in any action." *Black v. The Ritz-Carlton Hotel Co.,*  
14 *LLC*, 977 F. Supp. 2d 996, 1004 (C.D. Cal. 2013) (quoting *Burger King Corp. v.*  
15 *Rudzewicz*, 471 U.S. 462, 477-78 (1985)). "In the Ninth Circuit, a three-part test  
16 determines whether specific jurisdiction exists: (1) the non-resident defendant must  
17 purposefully direct its activities at, or consummate some transaction with, the forum  
18 state or a resident thereof; or perform some act by which it purposefully avails itself  
19 of the privilege of conducting activities in the forum; (2) the plaintiff's claim must  
20 be one that arises out of or relates to the defendant's forum-related activities; and (3)  
21 the exercise of jurisdiction must be reasonable." *Black v. The Ritz-Carlton Hotel*  
22 *Co., LLC*, 977 F. Supp. 2d 996, 1004 (C.D. Cal. 2013) (citing *Yahoo! Inc. v. La Ligue*  
23 *Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1205-06 (9th Cir. 2006)).  
24 The key evidence Defendants intend to present in support of this affirmative defense  
25 includes: Defendants will present testimony and documents establishing Mr. Owoc  
26 has continuously resided in Florida for forty years, he does not own any property in  
27 California, and he does not regularly travel to California.

**B. Claim 2 - Intentional Interference with Contractual Relations**

**1. Monster's Claim**

For Monster's third claim, stemming from its Fifth Cause of Action, Monster alleges that Defendants have intentionally interfered with contractual relations between Monster and various retailers.

The elements required to establish Monster's claim for intentional interference with contractual relations are as follows:

1. There was a contract between Monster and a third-party;
2. Defendants knew of that contract;
3. Defendants' conduct prevented performance of that contract or made performance of that contract more expensive or difficult;
4. Defendants' intended to disrupt the performance of that contract or knew that disruption of that contract was certain or substantially certain to occur;
5. Monster was harmed; and
6. Defendants' conduct was a substantial factor in cause Monster's harm.

*See* CACI 2201.

The key evidence Defendants intend to present in opposition to this claim includes: Defendants will demonstrate through witness testimony and documents that Monster has no admissible evidence that VPX intentionally disrupted Monster's contracts with third parties, or specifically that VPX placed its products in Monster's contracted for space. Defendants will also demonstrate through percipient and expert testimony of the numerous other potential causes for the misplacement of products, which were not investigated or ruled out by Monster. Defendants will also present testimony of Monster employees who will testify that they cannot identify even a single VPX employee who knew of Monster's contracts with third-party retailers and intentionally disrupted same. Defendants will also present documents and testimony establishing that VPX had authorization from retailers with respect to

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1 placement of its products on shelves and/or that Monster and other beverage  
2 competitors engaged in the same or similar shelving practices as VPX. Defendants  
3 will also show through documents, and percipient and expert testimony that Monster  
4 did not sustain any damages related to any alleged interference.

5       2.     Defendants' Affirmative Defenses<sup>2</sup>

6       Defendants' first affirmative defense against Monster's claim for Intentional  
7 Interference with Contractual Relations is Failure to Mitigate Damages. The  
8 elements to this affirmative defense include: (1) Monster failed to use reasonable  
9 efforts to mitigate its damages, and (2) the amount by which Monster's damages  
10 would have been mitigated. *See Palla v. LM Sports, Inc.*, 2019 WL 6464621, at \*9  
11 (E.D. Cal. Dec. 2, 2019) (citing MODEL CIV. JURY INSTR. 9<sup>th</sup> Cir. 5.3) ("defendant  
12 arguing a plaintiff failed to mitigate damages bears the burden of proving two  
13 elements by a preponderance of the evidence: (1) that the plaintiff failed to use  
14 reasonable efforts to mitigate damages; and (2) the amount by which damages would  
15 have been mitigated"). Model Civ. Jury Instr. 9th Cir. 5.3. The key evidence  
16 Defendants intend to present in support of this affirmative defense includes:  
17 Defendants will present testimony and documents establishing that Monster was  
18 aware of the alleged interference for years before filing suit.

19       Defendants' second affirmative defense against Monster's claim for  
20 Intentional Interference with Contractual Relations is Waiver. The elements to this  
21 affirmative defense include: the intentional relinquishment of a known right after  
22 full knowledge of the facts, or Monster's knowledge of Defendants' alleged  
23

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24       <sup>2</sup> Although not enumerated here, Defendants expressly reserve the right to assert and  
25 do not waive other defenses identified in its Answer, (*see* ECF 123), including  
26 failure to state a claim; lack of damages; punitive / enhanced damages improper;  
27 attorneys' fees improper; lack of standing; no injunctive relief; reasonable conduct;  
28 causation; and constitutional protections. Defendants further incorporate by  
reference its Responses and Supplemental Responses to Plaintiffs' Interrogatories to  
Owoc (Set Six).

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violation without timely notification of such violation. *See G.P.P., Inc. v. Guardian Prot. Prod., Inc.*, 2017 WL 220305, at \*43 (E.D. Cal. Jan. 18, 2017), *on reconsideration in part* 2017 WL 698335 (E.D. Cal. Feb. 21, 2017). The key evidence Defendants intend to present in support of this affirmative defense includes: Defendants will present testimony and documents establishing that Monster was aware of the alleged interference for years before filing suit.

Defendants' third affirmative defense against Monster's claim for Intentional Interference with Contractual Relations is Estoppel. The elements to this affirmative defense include: (1) Monster knew the facts; (2) Monster intended his conduct to be acted on (or acted in a manner such that Defendants have a right to believe Monster intended such reliance); (3) Defendants were ignorant of the true facts; and (4) Defendants relied on Monster's conduct to their detriment. *See Buster v. Comp. Comm. of the Bd. of Directors of Mechanics Bank*, 2016 WL 6804581, at \*2 (N.D. Cal. Nov. 17, 2016) (citing *Gabriel v. Alaska Elec. Pension Fund*, 773 F.3d 945, 955 (9th Cir. 2014)). The key evidence Defendants intend to present in support of this affirmative defense includes: Defendants will present testimony and documents establishing that Monster was aware of the alleged interference for years before filing suit. Defendants will also present testimony and evidence showing Monster's attempts to steal shelf space from VPX and/or interfere with VPX's contractual relationships. Specifically, VPX intends to introduce testimony from various Monster employees including Kellen Flores, James O'Brien, Chad Henry, Jeff Swift, and others regarding Monster's interference with VPX's contractual relationships and shelf space, as well as documents evidencing same. Defendant will also present evidence concerning Monster's "Truth About Bang" campaign, "Operation Eradicate Bang" campaign, f\*bang campaign, and other blitzes/campaigns designed to interfere with Bang's shelf space and/or contractual relationships. Defendants will show through documents and testimony that Monster sent notices and other communications to retailers and distributors purporting to advise of Monster's

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lawsuit and false or unproven claims about the Bang product. Defendants will also present documents and testimony establishing that Monster and other beverage competitors engaged in the same or similar practices as VPX with respect to the placement of its products on shelves.

Defendants' fourth affirmative defense against Monster's claim for Intentional Interference with Contractual Relations is Unclean Hands. The elements to this affirmative defense include: (1) Monster's conduct is inequitable, and (2) such conduct relates to the subject matter of its claims. *See POM Wonderful LLC v. Coca Cola Co.*, 166 F. Supp. 3d 1085, 1092 (C.D. Cal. 2016) ("To prevail on a defense of unclean hands, a defendant must demonstrate by clear and convincing evidence (1) that the plaintiff's conduct is inequitable; and (2) that the conduct relates to the subject matter of the plaintiff's claims."). The key evidence Defendants intend to present in support of this affirmative defense includes: Defendants will present testimony and documents establishing that Monster was aware of the alleged interference for years before filing suit. Defendants will also present testimony and evidence showing Monster's attempts to steal shelf space from VPX and/or interfere with VPX's contractual relationships. Specifically, VPX intends to introduce testimony from various Monster employees including Kellen Flores, James O'Brien, Chad Henry, Jeff Swift, and others regarding Monster's interference with VPX's contractual relationships and shelf space, as well as documents evidencing same. Defendant will also present evidence concerning Monster's "Truth About Bang" campaign, "Operation Eradicate Bang" campaign, f\*bang campaign, and other blitzes/campaigns designed to interfere with Bang's shelf space and/or contractual relationships. Defendants will show through documents and testimony that Monster sent notices and other communications to retailers and distributors purporting to advise of Monster's lawsuit and false or unproven claims about the Bang product. Defendants will also present documents and testimony establishing that Monster and other beverage competitors engaged in the same or similar practices as VPX with

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1     respective to the placement of its products on shelves.

2             Defendants’ fifth affirmative defense against Monster’s claim for Intentional  
3     Interference with Contractual Relations is Laches. The elements to this affirmative  
4     defense include: acquiescence despite full knowledge of the facts, with Monster  
5     engaging in an unreasonable delay, with such delay prejudicing Defendants. *See*  
6     *Obesity Research Inst., LLC v. Fiber Research Int’l, LLC*, 165 F. Supp. 3d 937, 954  
7     (S.D. Cal. 2016). The key evidence Defendants intend to present in support of this  
8     affirmative defense includes: Defendants will present testimony and documents  
9     establishing that Monster was aware of the alleged interference for years before  
10    filing suit.

11            Defendants’ sixth affirmative defense against Monster’s claim for Intentional  
12    Interference with Contractual Relations is Statute of Limitations. The elements to  
13    this affirmative defense include: intentional interference claims are governed by a  
14    two year statute of limitations. *See, e.g., Almont Ambulatory Surgery Ctr., LLC v.*  
15    *United Health Grp., Inc.*, 2015 WL 12777091, at \*17 (C.D. Cal. Feb. 12, 2015)  
16    (“Under California law, the statute of limitations for an intentional interference with  
17    contract claim is two years.”). The key evidence Defendants intend to present in  
18    support of this affirmative defense includes: Defendants will present testimony and  
19    documents that Monster was are of the alleged interference actions identified in the  
20    First Amended Complaint more than two years before it filed the present action.

21            Defendants’ seventh affirmative defense against Monster’s claim for  
22    Intentional Interference with Contractual Relations is Lack of Personal Jurisdiction  
23    as to Mr. Owoc. The elements to this affirmative defense include: “A court may  
24    exercise general jurisdiction over a defendant whose contacts with the forum are so  
25    ‘continuous and systematic’ that personal jurisdiction is proper in any action.” *Black*  
26    *v. The Ritz-Carlton Hotel Co., LLC*, 977 F. Supp. 2d 996, 1004 (C.D. Cal. 2013)  
27    (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477–78 (1985)). “In the  
28    Ninth Circuit, a three-part test determines whether specific jurisdiction exists: (1)



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1 the non-resident defendant must purposefully direct its activities at, or consummate  
2 some transaction with, the forum state or a resident thereof; or perform some act by  
3 which it purposefully avails itself of the privilege of conducting activities in the  
4 forum; (2) the plaintiff's claim must be one that arises out of or relates to the  
5 defendant's forum-related activities; and (3) the exercise of jurisdiction must be  
6 reasonable.” *Black v. The Ritz-Carlton Hotel Co., LLC*, 977 F. Supp. 2d 996, 1004  
7 (C.D. Cal. 2013) (citing *Yahoo! Inc. v. La Ligue Contre Le Racisme Et*  
8 *L'Antisemitisme*, 433 F.3d 1199, 1205-06 (9th Cir. 2006)). The key evidence  
9 Defendants intend to present in support of this affirmative defense includes:  
10 Defendants will present testimony and documents establishing Mr. Owoc has  
11 continuously resided in Florida for forty years, he does not own any property in  
12 California, and he does not regularly travel to California.

13 **C. Claim 3 – Intentional Interference with Prospective Economic Advantage**

14 1. Monster’s Claim

15 For Monster’s fifth claim, stemming from its Sixth Cause of Action, Monster  
16 alleges that Defendants have intentionally interfered with economic relationships  
17 between Monster and various retailers.

18 The elements required to establish Monster’s claim for Intentional  
19 Interference with Economic Relations are as follows:

- 20 1. Monster and one third-party were in an economic relationship that  
21 probably would have resulted in an economic benefit to Monster;
- 22 2. Defendants knew of that relationship;
- 23 3. Defendants’ attempts to secure self-space for VPX’s Bang products  
24 was “wrongful”;
- 25 4. By engaging in such wrongful conduct, Defendants intended to disrupt  
26 the relationship between Monster and the third-party or knew that  
27 disruption of the relationship between Monster and the third-party was  
28 certain or substantially certain to occur;

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- 1           5.     The relationship between Monster and the third-party was indeed  
2                 disrupted;  
3           6.     Monster was harmed; and  
4           7.     Defendants' conduct was a substantial factor in causing Monster's  
5                 harm.

6     *See* CACI 2202.

7           The key evidence Defendants intend to present in opposition to this claim  
8     includes: Defendants will demonstrate through witness testimony and documents  
9     that Monster has no admissible evidence that VPX intentionally disrupted Monster's  
10    relationships with third parties, or specifically that VPX placed its products in  
11    Monster's space. Defendants will also demonstrate through percipient and expert  
12    testimony of the numerous other potential causes for the misplacement of products,  
13    which were not investigated or ruled out by Monster. Defendants will also present  
14    testimony of Monster employees who will testify that they cannot identify even a  
15    single VPX employee who interfered with any prospective economic relationships.  
16    Defendants will also present documents and testimony establishing that VPX had  
17    authorization from retailers with respect to placement of its products on shelves  
18    and/or that Monster and other beverage competitors engaged in the same or similar  
19    shelving practices as VPX. Defendants will also show through documents, including  
20    financial records, and percipient and expert testimony that Monster did not sustain  
21    any damages related to any alleged interference.

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2. Defendants' Affirmative Defenses<sup>3</sup>

Defendants' first affirmative defense against Monster's claim for Intentional Interference with Economic Relations is Failure to Mitigate Damages. The elements to this affirmative defense include: (1) Monster failed to use reasonable efforts to mitigate its damages, and (2) the amount by which Monster's damages would have been mitigated. *See Palla v. LM Sports, Inc.*, 2019 WL 6464621, at \*9 (E.D. Cal. Dec. 2, 2019) (citing MODEL CIV. JURY INSTR. 9<sup>th</sup> Cir. 5.3) ("defendant arguing a plaintiff failed to mitigate damages bears the burden of proving two elements by a preponderance of the evidence: (1) that the plaintiff failed to use reasonable efforts to mitigate damages; and (2) the amount by which damages would have been mitigated"). Model Civ. Jury Instr. 9th Cir. 5.3. The key evidence Defendants intend to present in support of this affirmative defense includes: Defendants will present testimony and documents establishing that Monster was aware of the alleged interference for years before filing suit.

Defendants' second affirmative defense against Monster's claim for Intentional Interference with Economic Relations is Waiver. The elements to this affirmative defense include: the intentional relinquishment of a known right after full knowledge of the facts, or Monster's knowledge of Defendants' alleged violation without timely notification of such violation. *See G.P.P., Inc. v. Guardian Prot. Prod., Inc.*, 2017 WL 220305, at \*43 (E.D. Cal. Jan. 18, 2017), *on reconsideration in part* 2017 WL 698335 (E.D. Cal. Feb. 21, 2017). The key evidence Defendants intend to present in support of this affirmative defense

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<sup>3</sup> Although not enumerated here, Defendants expressly reserve the right to assert and do not waive other defenses identified in its Answer, (*see* ECF 123), including failure to state a claim; lack of damages; punitive / enhanced damages improper; attorneys' fees improper; lack of standing; no injunctive relief; reasonable conduct; causation; and constitutional protections. Defendants further incorporate by reference its Responses and Supplemental Responses to Plaintiffs' Interrogatories to Owoc (Set Six).

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1 includes: Defendants will present testimony and documents establishing that  
2 Monster was aware of the alleged interference for years before filing suit.

3 Defendants' third affirmative defense against Monster's claim for Intentional  
4 Interference with Economic Relations is Estoppel. The elements to this affirmative  
5 defense include: (1) Monster knew the facts; (2) Monster intended his conduct to be  
6 acted on (or acted in a manner such that Defendants have a right to believe Monster  
7 intended such reliance); (3) Defendants were ignorant of the true facts; and (4)  
8 Defendants relied on Monster's conduct to their detriment. *See Buster v. Comp.*  
9 *Comm. of the Bd. of Directors of Mechanics Bank*, 2016 WL 6804581, at \*2 (N.D.  
10 Cal. Nov. 17, 2016) (citing *Gabriel v. Alaska Elec. Pension Fund*, 773 F.3d 945, 955  
11 (9th Cir. 2014)). The key evidence Defendants intend to present in support of this  
12 affirmative defense includes: Defendants will present testimony and documents  
13 establishing that Monster was aware of the alleged interference for years before  
14 filing suit. Defendants will also present testimony and evidence showing Monster's  
15 attempts to steal shelf space from VPX and/or interfere with VPX's relationships.  
16 Specifically, VPX intends to introduce testimony from various Monster employees  
17 including Kellen Flores, James O'Brien, Chad Henry, Jeff Swift, and others  
18 regarding Monster's interference with VPX's relationships and shelf space, as well  
19 as documents evidencing same. Defendant will also present evidence concerning  
20 Monster's "Truth About Bang" campaign, "Operation Eradicate Bang" campaign,  
21 f\*Bang campaign, and other blitzes/campaigns designed to interfere with Bang's  
22 shelf space and/or relationships. Defendants will show through documents and  
23 testimony that Monster sent notices and other communications to retailers and  
24 distributors purporting to advise of Monster's lawsuit and false or unproven claims  
25 about the Bang product. Defendants will also present documents and testimony  
26 establishing that Monster and other beverage competitors engaged in the same or  
27 similar practices as VPX with respect to the placement of its products on shelves.

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Defendants' fourth affirmative defense against Monster's claim for Intentional Interference with Economic Relations is Unclean Hands. The elements to this affirmative defense include: (1) Monster's conduct is inequitable, and (2) such conduct relates to the subject matter of its claims. *See POM Wonderful LLC v. Coca Cola Co.*, 166 F. Supp. 3d 1085, 1092 (C.D. Cal. 2016) ("To prevail on a defense of unclean hands, a defendant must demonstrate by clear and convincing evidence (1) that the plaintiff's conduct is inequitable; and (2) that the conduct relates to the subject matter of the plaintiff's claims."). The key evidence Defendants intend to present in support of this affirmative defense includes: The key evidence Defendants intend to present in support of this affirmative defense includes: Defendants will present testimony and documents establishing that Monster was aware of the alleged interference for years before filing suit. Defendants will also present testimony and evidence showing Monster's attempts to steal shelf space from VPX and/or interfere with VPX's relationships. Specifically, VPX intends to introduce testimony from various Monster employees including Kellen Flores, James O'Brien, Chad Henry, Jeff Swift, and others regarding Monster's interference with VPX's relationships and shelf space, as well as documents evidencing same. Defendant will also present evidence concerning Monster's "Truth About Bang" campaign, "Operation Eradicate Bang" campaign, f\*bang campaign, and other blitzes/campaigns designed to interfere with Bang's shelf space and/or relationships. Defendants will show through documents and testimony that Monster sent notices and other communications to retailers and distributors purporting to advise of Monster's lawsuit and false or unproven claims about the Bang product. Defendants will also present documents and testimony establishing that Monster and other beverage competitors engaged in the same or similar practices as VPX with respect to the placement of its products on shelves.

Defendants' fifth affirmative defense against Monster's claim for Intentional Interference with Economic Relations is Laches. The elements to this affirmative

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1 defense include: acquiescence despite full knowledge of the facts, with Monster  
2 engaging in an unreasonable delay, with such delay prejudicing Defendants. *See*  
3 *Obesity Research Inst., LLC v. Fiber Research Int'l, LLC*, 165 F. Supp. 3d 937, 954  
4 (S.D. Cal. 2016). The key evidence Defendants intend to present in support of this  
5 affirmative defense includes: Defendants will present testimony and documents  
6 establishing that Monster was aware of the alleged interference for years before  
7 filing suit.

8 Defendants' sixth affirmative defense against Monster's claim for Intentional  
9 Interference with Economic Relations is Statute of Limitations. The elements to this  
10 affirmative defense include: interference with prospective economic relations claims  
11 are governed by a two-year statute of limitations. *See, e.g., Denver Urb.*  
12 *Homesteading, LLC v. Dervaes Inst.*, 2015 WL 12819140, at \*3 (C.D. Cal. July 14,  
13 2015) ("two-year statute of limitations applies to . . . intentional interference with  
14 prospective economic relations"). The key evidence Defendants intend to present in  
15 support of this affirmative defense includes: Defendants will present testimony and  
16 documents that Monster was are of the alleged interference actions identified in the  
17 First Amended Complaint more than two years before it filed the present action.

18 Defendants' seventh affirmative defense against Monster's claim for  
19 Intentional Interference with Economic Relations is Lack of Personal Jurisdiction as  
20 to Mr. Owoc. The elements to this affirmative defense include: "A court may  
21 exercise general jurisdiction over a defendant whose contacts with the forum are so  
22 'continuous and systematic' that personal jurisdiction is proper in any action." *Black*  
23 *v. The Ritz-Carlton Hotel Co., LLC*, 977 F. Supp. 2d 996, 1004 (C.D. Cal. 2013)  
24 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477-78 (1985)). "In the  
25 Ninth Circuit, a three-part test determines whether specific jurisdiction exists: (1)  
26 the non-resident defendant must purposefully direct its activities at, or consummate  
27 some transaction with, the forum state or a resident thereof; or perform some act by  
28 which it purposefully avails itself of the privilege of conducting activities in the



forum; (2) the plaintiff's claim must be one that arises out of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction must be reasonable.” *Black v. The Ritz-Carlton Hotel Co., LLC*, 977 F. Supp. 2d 996, 1004 (C.D. Cal. 2013) (citing *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1205-06 (9th Cir. 2006)). The key evidence Defendants intend to present in support of this affirmative defense includes: Defendants will present testimony and documents establishing Mr. Owoc has continuously resided in Florida for forty years, he does not own any property in California, and he does not regularly travel to California.

**D. Claim 4 – Trade Secret Misappropriation**

**1. Monster’s Claim**

For Monster’s sixth claim, stemming from its Tenth and Eleventh Causes of Action, Monster alleges that Defendants misappropriated Monster’s trade secrets under both state and federal law.

The elements required to establish Monster’s claim for Trade Secret Misappropriation are as follows:

1. Monster owned pricing-related information;
2. This pricing-related information was a trade secret at the time of the misappropriation;
3. Defendants improperly acquired or improperly used the trade secret;
4. Monster was harmed or that Defendants were unjustly enriched; and
5. Defendants’ acquisition or use of the trade secret was a substantial factor in causing Monster’s harm or Defendants’ unjust enrichment.

*See* CACI 4401 (elements of CUTSA claim); 3 FED. JURY PRAC. & INSTR. § 127:10 (6th ed.) (elements of DTSA claim); *Degree Mech., Inc. v. J.C. Welding, LLC*, 2019 WL 4082689, at \*2 (N.D. Cal. Aug. 29, 2019) (elements of DTSA claim); *see also Vendavo, Inc. v. Pricef(x) AG*, 2018 WL 1456697, at \*3 (N.D. Cal. Mar. 23, 2018) (“elements of a trade secret misappropriation claim under the DTSA are

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1 substantially similar to those under [CUTSA]”).

2 The key evidence Defendants intend to present in opposition to this claim  
3 includes: Defendants will show through testimony and documents that Monster has  
4 failed to sufficiently identify its alleged trade secrets. Defendants will also show  
5 through testimony of VPX employees, Monster employees, and communications  
6 with retailers that Monster failed to take any steps to maintain the secrecy of its  
7 alleged confidential information. Defendants will also show that Monster has failed  
8 to demonstrate that VPX employees obtained Monster’s trade secrets unlawfully or  
9 that VPX improperly used the trade secret information. Finally, Defendants will  
10 show through documents and testimony that Monster sustained no damages as a  
11 result of any alleged misappropriation.

12 2. Defendants’ Affirmative Defenses<sup>4</sup>

13 Defendants’ first affirmative defense against Monster’s claim for Trade Secret  
14 Misappropriation is Failure to Mitigate Damages. The elements to this affirmative  
15 defense include: (1) Monster failed to use reasonable efforts to mitigate its damages,  
16 and (2) the amount by which Monster’s damages would have been mitigated. *See*  
17 *Palla v. LM Sports, Inc.*, 2019 WL 6464621, at \*9 (E.D. Cal. Dec. 2, 2019) (citing  
18 MODEL CIV. JURY INSTR. 9th Cir. 5.3) (“defendant arguing a plaintiff failed to  
19 mitigate damages bears the burden of proving two elements by a preponderance of  
20 the evidence: (1) that the plaintiff failed to use reasonable efforts to mitigate  
21 damages; and (2) the amount by which damages would have been mitigated”).  
22 Model Civ. Jury Instr. 9th Cir. 5.3. The key evidence Defendants intend to present

23 \_\_\_\_\_  
24 <sup>4</sup> Although not enumerated here, Defendants expressly reserve the right to assert and  
25 do not waive other defenses identified in its Answer, (*see* ECF 123), including  
26 failure to state a claim; lack of damages; punitive / enhanced damages improper;  
27 attorneys’ fees improper; lack of standing; no injunctive relief; reasonable conduct;  
28 causation; and constitutional protections. Defendants further incorporate by  
reference its Responses and Supplemental Responses to Plaintiffs’ Interrogatories to  
Owoc (Set Six).

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1 in support of this affirmative defense includes: Defendants will present testimony  
2 and documents showing Monster failed to take efforts to maintain the secrecy of its  
3 alleged trade secrets.

4 Defendants' second affirmative defense against Monster's claim for Trade  
5 Secret Misappropriation is Waiver. The elements to this affirmative defense include:  
6 the intentional relinquishment of a known right after full knowledge of the facts, or  
7 Monster's knowledge of Defendants' alleged violation without timely notification  
8 of such violation. *See G.P.P., Inc. v. Guardian Prot. Prod., Inc.*, 2017 WL 220305,  
9 at \*43 (E.D. Cal. Jan. 18, 2017), *on reconsideration in part* 2017 WL 698335 (E.D.  
10 Cal. Feb. 21, 2017). The key evidence Defendants intend to present in support of  
11 this affirmative defense includes: Defendants will present testimony and documents  
12 showing Monster failed to take efforts to maintain the secrecy of its alleged trade  
13 secrets.

14 Defendants' third affirmative defense against Monster's claim for Trade  
15 Secret Misappropriation is Estoppel. The elements to this affirmative defense  
16 include: (1) Monster knew the facts; (2) Monster intended his conduct to be acted  
17 on (or acted in a manner such that Defendants have a right to believe Monster  
18 intended such reliance); (3) Defendants were ignorant of the true facts; and (4)  
19 Defendants relied on Monster's conduct to their detriment. *See Buster v. Comp.*  
20 *Comm. of the Bd. of Directors of Mechanics Bank*, 2016 WL 6804581, at \*2 (N.D.  
21 Cal. Nov. 17, 2016) (citing *Gabriel v. Alaska Elec. Pension Fund*, 773 F.3d 945, 955  
22 (9th Cir. 2014)). The key evidence Defendants intend to present in support of this  
23 affirmative defense includes: Defendants will present evidence and testimony that  
24 Monster accessed or tried to access Bang's pricing information and/or other trade  
25 secret or confidential/proprietary information. Such testimony will include Brittany  
26 Garrison, Chad Henry, Mario Suarez, Guillame Weaver, and Michael Trento, as well  
27 as exhibits to their depositions, among other documents.

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Defendants' fourth affirmative defense against Monster's claim for Trade Secret Misappropriation is Unclean Hands. The elements to this affirmative defense include: (1) Monster's conduct is inequitable, and (2) such conduct relates to the subject matter of its claims. *See POM Wonderful LLC v. Coca Cola Co.*, 166 F. Supp. 3d 1085, 1092 (C.D. Cal. 2016) ("To prevail on a defense of unclean hands, a defendant must demonstrate by clear and convincing evidence (1) that the plaintiff's conduct is inequitable; and (2) that the conduct relates to the subject matter of the plaintiff's claims."). The key evidence Defendants intend to present in support of this affirmative defense includes: Defendants intend to introduce testimony and evidence that Monster representatives improperly obtained VPX confidential information, without VPX's consent. Specifically, Defendants will introduce testimony of various Monster employees including Brittany Garrison, Ron Gritton, and others who admitted to obtaining VPX confidential information, along with the documents improperly obtained.

Defendants' fifth affirmative defense against Monster's claim for Trade Secret Misappropriation is Lack of Personal Jurisdiction as to Mr. Owoc. The elements to this affirmative defense include: "A court may exercise general jurisdiction over a defendant whose contacts with the forum are so 'continuous and systematic' that personal jurisdiction is proper in any action." *Black v. The Ritz-Carlton Hotel Co., LLC*, 977 F. Supp. 2d 996, 1004 (C.D. Cal. 2013) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477-78 (1985)). "In the Ninth Circuit, a three-part test determines whether specific jurisdiction exists: (1) the non-resident defendant must purposefully direct its activities at, or consummate some transaction with, the forum state or a resident thereof; or perform some act by which it purposefully avails itself of the privilege of conducting activities in the forum; (2) the plaintiff's claim must be one that arises out of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction must be reasonable." *Black v. The Ritz-Carlton Hotel Co., LLC*, 977 F. Supp. 2d 996, 1004 (C.D. Cal. 2013) (citing

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1 *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199,  
2 1205-06 (9th Cir. 2006)). The key evidence Defendants intend to present in support  
3 of this affirmative defense includes: Defendants will present testimony and  
4 documents establishing Mr. Owoc has continuously resided in Florida for forty  
5 years, he does not own any property in California, and he does not regularly travel  
6 to California.

7 **E. Claim 5 – Violation of Computer Fraud and Abuse Act**

8 1. Monster's Claim

9 For Monster's seventh claim, stemming from its Twelfth Cause of Action,  
10 Monster alleges that Defendants have violated the Computer Fraud and Abuse Act  
11 ("CFAA") by accessing or attempting to access certain Monster-owned computers.

12 The elements required to establish Monster's claim for violation of Section  
13 1030(a)(2) of the CFAA are as follows:

- 14 1. Defendants intentionally accessed;
- 15 2. A protected computer;
- 16 3. Without Monster's authorization or exceeding Monster's authorized  
17 access;
- 18 4. Defendants obtained information from that computer; and
- 19 5. Monster experienced a loss of at least \$5,000 in one year from that  
20 improper access.

21 *See LVRC Holdings, LLC v. Brekka*, 581 F.3d 1127, 1132 (9th Cir. 2009).

22 The elements required to establish Monster's claim for violation of Section  
23 1030(a)(4) of the CFAA are as follows:

- 24 1. Defendants accessed a protected computer;
- 25 2. Defendants' access was "knowingly";
- 26 3. Defendants' access was with "intent to defraud";
- 27 4. Defendants' access was without Monster's authorization or exceeded  
28 Monster's authorized access;

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1 5. Defendants obtained anything of value; and

2 6. Defendants' acquisition / access caused Monster to experience a loss of  
3 at least \$5,000 in one year.

4 *See LVRC Holdings, LLC v. Brekka*, 581 F.3d 1127, 1132 (9th Cir. 2009).

5 The key evidence Defendants intend to present in opposition to this claim  
6 includes: Monster has failed to present any evidence of unauthorized access to its  
7 computer system. With respect to Cohen's alleged "access" to an unspecific iPhone,  
8 Monster's own expert, Melanie Redel, will testify that she is unable to rule out  
9 activity stemming from an incoming stimulus or whether it was Cohen who activated  
10 the phone at all. Moreover, Monster has no evidence of actual harm to computers,  
11 as opposed to economic harm due to the value of the data itself.

12 2. Defendants' Affirmative Defenses<sup>5</sup>

13 Defendants' first affirmative defense against Monster's claim for Violation of  
14 the CFAA is Failure to Mitigate Damages. The elements to this affirmative defense  
15 include: (1) Monster failed to use reasonable efforts to mitigate its damages, and (2)  
16 the amount by which Monster's damages would have been mitigated. *See Palla v.*  
17 *LM Sports, Inc.*, 2019 WL 6464621, at \*9 (E.D. Cal. Dec. 2, 2019) (citing MODEL  
18 CIV. JURY INSTR. 9<sup>th</sup> Cir. 5.3) ("defendant arguing a plaintiff failed to mitigate  
19 damages bears the burden of proving two elements by a preponderance of the  
20 evidence: (1) that the plaintiff failed to use reasonable efforts to mitigate damages;  
21 and (2) the amount by which damages would have been mitigated"). Model Civ.  
22 Jury Instr. 9th Cir. 5.3. The key evidence Defendants intend to present in support of

23 \_\_\_\_\_  
24 <sup>5</sup> Although not enumerated here, Defendants expressly reserve the right to assert and  
25 do not waive other defenses identified in its Answer, (*see* ECF 123), including  
26 failure to state a claim; lack of damages; punitive / enhanced damages improper;  
27 attorneys' fees improper; lack of standing; no injunctive relief; reasonable conduct;  
28 causation; and constitutional protections. Defendants further incorporate by  
reference its Responses and Supplemental Responses to Plaintiffs' Interrogatories to  
Owoc (Set Six).



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1 this affirmative defense includes: Defendants will present testimony and documents  
2 showing Monster failed to take efforts to protect its computer(s).

3 Defendants' second affirmative defense against Monster's claim for Violation  
4 of the CFAA is Waiver. The elements to this affirmative defense include: the  
5 intentional relinquishment of a known right after full knowledge of the facts, or  
6 Monster's knowledge of Defendants' alleged violation without timely notification  
7 of such violation. *See G.P.P., Inc. v. Guardian Prot. Prod., Inc.*, 2017 WL 220305,  
8 at \*43 (E.D. Cal. Jan. 18, 2017), *on reconsideration in part* 2017 WL 698335 (E.D.  
9 Cal. Feb. 21, 2017). The key evidence Defendants intend to present in support of  
10 this affirmative defense includes: Defendants will present testimony and documents  
11 showing Monster failed to take efforts to protect its computer(s).

12 Defendants' third affirmative defense against Monster's claim for Violation  
13 of the CFAA is Estoppel. The elements to this affirmative defense include: (1)  
14 Monster knew the facts; (2) Monster intended his conduct to be acted on (or acted  
15 in a manner such that Defendants have a right to believe Monster intended such  
16 reliance); (3) Defendants were ignorant of the true facts; and (4) Defendants relied  
17 on Monster's conduct to their detriment. *See Buster v. Comp. Comm. of the Bd. of*  
18 *Directors of Mechanics Bank*, 2016 WL 6804581, at \*2 (N.D. Cal. Nov. 17, 2016)  
19 (citing *Gabriel v. Alaska Elec. Pension Fund*, 773 F.3d 945, 955 (9th Cir. 2014)).  
20 The key evidence Defendants intend to present in support of this affirmative defense  
21 includes: Defendants will present testimony and documents showing Monster failed  
22 to take efforts to protect its computer(s).

23 Defendants' fourth affirmative defense against Monster's claim for Violation  
24 of the CFAA is Lack of Personal Jurisdiction as to Mr. Owoc. The elements to this  
25 affirmative defense include: "A court may exercise general jurisdiction over a  
26 defendant whose contacts with the forum are so 'continuous and systematic' that  
27 personal jurisdiction is proper in any action." *Black v. The Ritz-Carlton Hotel Co.,*  
28 *LLC*, 977 F. Supp. 2d 996, 1004 (C.D. Cal. 2013) (quoting *Burger King Corp. v.*

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*Rudzewicz*, 471 U.S. 462, 477–78 (1985)). “In the Ninth Circuit, a three-part test determines whether specific jurisdiction exists: (1) the non-resident defendant must purposefully direct its activities at, or consummate some transaction with, the forum state or a resident thereof; or perform some act by which it purposefully avails itself of the privilege of conducting activities in the forum; (2) the plaintiff’s claim must be one that arises out of or relates to the defendant’s forum-related activities; and (3) the exercise of jurisdiction must be reasonable.” *Black v. The Ritz-Carlton Hotel Co., LLC*, 977 F. Supp. 2d 996, 1004 (C.D. Cal. 2013) (citing *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme*, 433 F.3d 1199, 1205-06 (9th Cir. 2006)). The key evidence Defendants intend to present in support of this affirmative defense includes: Defendants will present testimony and documents establishing Mr. Owoc has continuously resided in Florida for forty years, he does not own any property in California, and he does not regularly travel to California.

## II. EVIDENTIARY ISSUES

The parties met and conferred regarding motions in limine and each party intends to file motions in limine to be heard at the Final Pretrial Conference on February 14, 2022. The parties also filed *Daubert* motions on December 20, 2021.

## III. ISSUES OF LAW

VPX does not presently anticipate that any issues of law may arise at trial other than the issues raised by any motions in limine as well as issues that are not addressed in the parties’ proposed jury instructions.

## IV. BIFURCATION OF ISSUES

VPX requests bifurcation of liability and damages, and bifurcation of punitive damages from other damages issues.

Federal Rule of Civil Procedure 42(b) provides that bifurcation may be ordered “[f]or convenience, to avoid prejudice, or to expedite and economize[.]” Fed. R. Civ. P. 42(b). In analyzing whether bifurcation is appropriate, “courts typically consider factors such as convenience, prejudice to the parties,

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simplification of discovery and conservation of resources, risk of jury confusion, and separability of the issues.” *Eagle Indus. Group, Inc. v. Vogt Manufacturing Co.*, 2014 WL 12603096, at \*1 (C.D. Cal. Sep. 25, 2014). The “factors of convenience, avoidance of prejudice and what will be conducive to expedition and economy are all in the alternative,” and the “presence of any standard may be sufficient to sustain an order for a separate trial in the exercise of the court's discretion.” *Min Productions PTE, Ltd. v. FireForge, Inc.*, 2017 WL 11635012, at \*1 (C.D. Cal. Feb. 8, 2017). Courts have observed that bifurcation “may...be appropriate where the evidence offered on two different issues will be wholly distinct ... or where litigation of one issue may obviate the need to try another issue.” *Id.* (citations and internal quotation marks omitted).

In analyzing whether to bifurcate trial on the issues of liability and damages, courts will be more likely to bifurcate if there is little or no overlap of issues in each phase. *See, e.g., Trimed, Inc. v. Stryker Corp.*, 2010 WL 11462840, at \*4-\*5 (C.D. Cal. Sep. 1, 2010); *POM Wonderful LLC v. Welch Foods, Inc.*, 2010 WL 4794235, at \*4 (C.D. Cal. Nov. 18, 2010). Courts are also more likely to bifurcate if a matter involves complex issues raising the potential of jury confusion. *See id.* at \*5. Bifurcating trial into liability and damages phases promotes judicial economy, as evidence regarding damages does not need to be considered unless and until the defendant is found liable. *See Trimed*, 2010 WL 11462840, at \*5.

Here, Monster has filed five separate and independent causes of action against VPX, each with its own damages. It would serve judicial economy to have the jury determine liability. It is possible the jury will find for VPX on one or more of the causes of action, thereby obviating the need for prolonged damages testimony on all causes of action and avoiding jury confusion.

## V. JURY TRIAL

Monster’s Second and Third Claims, for violations of the UCL and FAL respectively, are equitable in nature and so should be tried to the Court. *See*

1 *Nationwide Biweekly Admin., Inc. v. Super. Ct. of Alameda Cty.*, 9 Cal.5th 279, 305  
2 (2020) (“cause of action under the UCL . . . is to be tried by the court rather than by  
3 a jury); *id.* at 327 (“no right to a jury trial under the California Constitution in a cause  
4 of action under the UCL or the FAL”).

5 Monster’s remaining claims, however, should be tried to a jury:

6 Monster’s First Claim, for violation of the Lanham Act is appropriate to  
7 present to a jury. *See Adidas-America, Inc. v. Payless Shoesource, Inc.*, 546  
8 F.Supp.2d 1029, 1087 (D. Or. 2008) (denying motion to strike jury demand in  
9 Lanham Act case because “any legal claim—that is, any claim for monetary  
10 damages—entitles a party to a jury trial”).

11 Similarly, Monster’s Fourth and Fifth Claims, for intentional interference with  
12 contractual relations and intentional interference with prospective economic  
13 advantage respectively, are also appropriate to present to a jury. *Cf.* CACI 2210,  
14 CACI 2202 (providing jury instructions for interference claims); *Openwave Sys.,*  
15 *Inc. v. Myriad France SAS*, 2011 WL 2580991, at \*7 (N.D. Cal. June 29, 2011)  
16 (advising “intentional interference claim will be resolved in a jury trial if summary  
17 judgment is avoided”).

18 Monster’s Sixth Claim, for trade secret misappropriation, is similarly  
19 appropriate to present to a jury. *Cf.* CACI 4400, 3 FED. JURY PRAC. & INSTR. §  
20 127:10 (providing jury instructions for misappropriation claims).

21 Finally, Monster’s Seventh Claim, for violation of the Computer Fraud and  
22 Abuse Act should be presented to a jury. *See, e.g., Oracle USA, Inc. v. Rimini Street,*  
23 *Inc.*, 209 F.Supp.3d 1200, 1206 (D. Nev. 2016), vacated in part by 922 F.3d 879  
24 (observing jury trial for CFAA claim); *Calendar Research, LLC v. StubHub, Inc.*,  
25 2020 WL 4390391, at \*27 (C.D. Cal. May 13, 2020) (denying summary judgment  
26 on CFAA claim and setting same for jury trial).

27 Monster demanded a jury trial in both its Original Complaint, (*see* ECF 1 at  
28 32:1-2), as well as in its First Amended Complaint. *See* ECF 61 at 48:8-9.

Defendants also demanded a jury trial in their Original Answer, (*see* ECF 58 at 7:1-5), as well as in their Answer to the FAC. *See* ECF 123 at 27:23-25.

## VI. ATTORNEY'S FEES

VPX reserves the right to seek attorney's fees under the Lanham Act should VPX prevail and the Court determine this case presents an "exceptional case[]." 15 U.S.C. § 1117(a).

## VII. ABANDONED ISSUES

Monster's Fourth Cause of Action, for trade libel, Seventh Cause of Action, for conversion, Eighth Cause of Action, for larceny, and Ninth Cause of Action, for false patent marking, have been dismissed and so are considered abandoned. *Compare* ECF 61 (Monster's FAC) *with* ECF 95 (Court Order on MTD).

Defendants acknowledge abandoning the following affirmative defenses that were originally pleaded in their Answer to the FAC (*see* ECF 123): Failure to Join an Indispensable or Necessary Party; Apportionment of Fault; Equitable Indemnity; and Reservation of Defenses.

Dated: January 24, 2022

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